Supreme Court, U.S.
FILED

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CASE NO. OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ELINOR S. KING
Petitioner

v.

ROBERT ABRAMS
L. FOSTER JAMES
JOHN AUSTIN
WILLIAM H. KINERY
UNITED STATES DEPARTMENT
OF JUSTICE
Respondents

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Elinor S. King
Petitioner - Pro se
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QUESTIONS PRESENTED FOR REVIEW

1. Does the due process clause extend the same constitutional protections to a civil contemnor as it does a criminal contemnor where imprisonment is a possibility and/or where property may be taken as a punishment (right to a public trial, jury trial, etc.)?

2. Does a parent have a constitutional right to attend her son's contempt proceeding?

3. Must the court have personal and subject matter jurisdiction to punish a person for civil contempt?

4. Can attorneys, state officials and judges be held personnally liable for their actions in the deprivation of constitutional and civil rights?

5. Are attorney's liable for their actions when they conspire with those acting under color state law?

6. Do sections 433, 435, 439, 449 and 451 of the Family Court Act violate the U.S. Constitution?

7. Do Federal Courts have a duty to protect constitutional rights in State court proceedings?

8. When does the Statute of Limitations begin to run for the violation of rights in a civil contempt proceeding?

LIST OF ALL PARTIES

I certify that the following comprise all interested persons known to Petitioner:

Elinor S. King - Petitioner pro se

Respondents

Robert Abrams
L. Foster James
John Austin
William H. Keniry

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TABLE OF CONTENTS

Questions presented for review	p.	i
List of all interested parties	p.	ii
Table of Contents	p.	iii
Table of Authorities	p.	iv
Official Court Opinions	p.	1
Statement of Jurisdiction	p.	2
Constitutional Provisions & Statutes	p.	3
Statement of the Case	p.	9
Facts of the Case	p.	9
Arguments	p.	17
Conclusion	p.	42
Appendix	p.	45

TABLE OF AUTHORITIES

Constitutional Provisions, Statutes & Rules

U.S. Const. Art. VI, Section 2	p. 3
U.S. Constitution, Amendment I	p. 3
U.S. Constitution, Amendment V	p. 3
U.S. Constitution Amendment VI	p. 4
U.S. Constitution Amendment XIV	p. 5
Title 18 U.S.C. Section 1(3)	p. 24
Title 28 U.S.C. Section 1254	p. 2
Title 28 U.S.C. Section 1343	p. 2
Title 42 U.S.C. Section 1983	p. 5, 39
Title 42 U.S.C. Section 1985	p. 6

United States Supreme Court

Argersinger v. Hamlin	p. 19, 22
Baldwin v. New York	p. 26
Blanton v. City of North Las Vegas	p. 25
Bloome v. Illinois	p. 25
Bradley v. Fisher	p. 34
Frank v. United States	p. 25
Harris v. United States	p. 20
In Re Oliver	p. 17, 20
Jones v. Alfred H. Mayer Co.	p. 32

Lynch v. Household Finance Corp. p. 32

McDonald v. McBee p. 32

Muniz v. Hoffman p. 25, 26

Pennoyer v. Neff p. 32

Richmond Newspapers Inc. v. Virginia p. 21

Stump v. Sparkman p. 33

United States v. Jenkins p. 25

United States Court of Appeals

Briley v. State of California p. 38, 39

Dinwiddie v. Brown p. 33

Dykes v. Hoseman p. 32, 33

Fitzergerald v. Hampton p. 19

Hankle v. Bradshaw p. 19, 20

In Re DiBella p. 18, 19

In Re Kilgo p. 19, 20

In Re Rosahn p. 17

Martin v. Merola p. 38

Rankin v. Howard p. 32, 34

Richter v. Fairbanks p. 29

Smith v. State of Kansas p. 35

United States v. Jenkins p. 25

United States v. Rylander p. 25

United States ex rel. Griffen v. Martin p. 29

United States v. Sun Kung Kang p. 19

Woods v. Wright p. 35

Federal District Court

Arment v. Commonwealth Nat. Bank p. 33

Farber v. Rochford p. 37

Hofferber v. The first National
Bank of Guyman, Oklahoma p. 32

Javits v. Stevens p. 36

Staud v. Stewart p. 35

Sostre v. Rockefeller p. 36

New York State Constitution

Article 6, Section 13 p. 30, 34

State Statutes

Civil Practice Law & Rules § 214 p. 39

County Law § 722 p. 8

Family Court Act § 433 p. 23, 42

Family Court Act § 435 p.

Family Court Act § 439 p. 30

Family Court Act § 449 p. 37

Family Court Act § 451 p. 37

Family Court Act § 454 p. 26, 27,29

Family Court Act § 456 p. 28

Judiciary Law Art. 2 § 4 p. 23

Judiciary Law § 28 p. 28

New York Penal Law, Art. 10 p. 22

New York State Court of Appeals

Matter of Westchester Rockland Newspapers, Inc. v.Leggett p. 21

The People v. Cuevas p. 21

New York Appellate Court

Abbondola v. Abbondola p. 42

Harold Co., Inc. v. Weisenberg p. 21

Hynes v. Hartman p. 20

Privitera v. Town of Phelps p. 32

People v. Gonalez p. 21

Silvestris v. Silvestris p. 42

The People v. Warren O p. 21

New York Family Court

Larisa F. v. Micheal S. p. 20

Linda G. v. Theoradore G p. 23

Matter of Chase p. 21

OFFICIAL COURT OPINIONS

The United States District Court issued its ruling from the bench on November 9, 1992 and issued its Order on February 20, 1993 (92-CV-1004) dismissing Petitioner's complaint.

The United States Court of Appeals for the Second Circuit affirmed the District Court's Decision and Order on October 22, 1993 (93-6065)

STATEMENT OF JURISDICTION

This Petition for Writ of Certiorari sought from the final Order of the United States Court of Appeals for the Second Circuit issued October 22, 1993 (93-6065) and is herein filed within the ninety (90) day requirement.

This Court has jurisdiction pursuant to 28 U.S.C. Section 1254.

District Court had jurisdiction pursuant to 28 U.S.C. Section 1343.

Elinor S. King

Elinor S. King
Petitioner - Pro se

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Constitution, Article VI, Section 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of

indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militias, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprive of life, liberty or property, without `ue process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy trial by an impartial jury of the State and district wherein the crime shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of

Counsel for his defense.

United States Constitution, Amendment XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42 U.S.C. Section 1983

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or

immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Title 42 U.S.C. Section 1985

Conspiracy to interfere with Civil Rights.

(2) If two or more persons in any State or Territory conspire to deter by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of having so attended or testified, or to influence the verdict, presentment, or indictment of any grand jury or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons

conspire for the purpose of impeding, hindering, obstructing, or defeating in any manor, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of laws, or to injure him or his property for lawfully enforcing or attempting to enforce, the right of any person, or class of persons, to equal protection of the laws;

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protections of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory form giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimi-

dation, or threat of any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, of one or more persons engage therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having exercised any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

STATEMENT OF CASE

This is an appeal from the final Order filed October 22, 1993 by the United States Court of Appeals for the Second Circuit affirming the ruling from the bench of the District Court on November 9, 1992 and the Order of the District Court dated February 20, 1993.

FACTS

Petitioner's son, Charles E. Collins III, and Arlene M. Carella (formerly Collins) were divorced by a New York State Supreme Court decree signed July 27, 1981 and entered on August 3, 1981 which provided for support, visitation and custody of the children of the marriage.

In 1984, three (3) years after Mr Collins' divorce, Petitioner, her husband and Mr Collins purchased a house at 189 Wooddale Drive, Ballston Lake, New York with each owning a 1/3 interest. This was not marital property.

In April, 1985 Ms Carella filed a Petition in order to bring a civil contempt charge against Mr Collins titled Arlene Collins v. Charles E. Collins, III and an Order to Show Cause was issued on April 26, 1985 demanding

among other things:

> . . . why an Order should not be made granting the following relief:
>
> (a) holding respondent in contempt of court for his failure to pay support required by court order;
>
> (c) awarding to petitioner sole and exclusive possession of the premises commonly known as 189 Wooddale Drive, Ballston Lake, New York until the disposition of the petitioner herein;

That on April 8, 1986 Judge L. Foster James held a contempt hearing in which Petitioner was not a party to the proceeding and was told to leave the courtroom at the beginning of the trial. There was no reason given for evicting Petitioner from the courtroom and the closing of the court to the public.

On April 22, 1986 Judge James issued his Decision and Order, based upon the April 8, 1986 contempt hearing, giving Ms Carella exclusive possession of Petitioner's property. Judge James' Decision and Order documents that he knew that this **was not** marital property and that he knew Petitioner was a part owner and that she **was not** a party to the action.

Mr Collins has been tried, convicted and/or sentenced to jail for contempt on several occasions and is

currently facing a secret contempt proceeding. During these contempt proceedings Mr Collins was not informed of his rights as required by law, was deprived of counsel, was not allowed to cross-examine witnesses, and has been tried, convicted and sentenced to jail for contempt by a person who is not even a judge but rather a non-elected, non-judicial employee of the Unified Court System of New York and whose rulings in contempt proceedings have been the basis of convicting Mr Collins of contempt and sentencing him to jail as well as depriving him and Petitioner of their property as a punishment. All the contempt proceedings were held in secret as Petitioner and the public have been denied access to court. The court was closed above Mr Collins' objections and no reason was given for the closing.

The Appellate Court in its January 26, 1989 Opinion, overturning Mr Collins' conviction for contempt on April 15, 1987, September 17, 1987 and January 25, 1988 in which he was sentenced to jail, states:

> Family Court Act § 455 (2) provides that a Court, "if satisfied by competent proof that the respondent is financially unable to comply with [a support] order may, upon showing a good cause until further order

of the court, modify such order and relieve the respondent form the commitment order". Family Court's conclusions appear to be **based on few facts in the record**, namely, that respondent made arrangements to have a certain job interview postponed until court action regarding support payments was completed; that respondent was coincidentally fired after an income execution on his salary was filed; that respondent has not been able to obtain more lucrative employment; and that respondent took a field trip to the Bahamas after selling his business. On the other hand, the record discloses numerous attempts to successfully comply with the order of support, including borrowing money or, in the alternative, to have the support order modified so as to render compliance practicable. Family Court's emphasis on respondent's **alleged access to funds is not well founded** in this record. There was much testimony concerning the financial status of respondent's mother from which the court could have assumed that funds were available to him, including the fact that respondent had resided with his mother rent free from 1981 and that she appears willing to offer financial assistance to him. However, **the mother's financial status cannot be said to be respondent's status.**

In the case at bar, the record does not demonstrate a failure to make support payments accompanied by an absence of any attempt to modify the order of support, nor does it demonstrate the failure to use any part of respondent's wages to make support payments while regularly employed so as to constitute prima facia evidence of willfulness (see, Family Court Act § 454 [3] [a]; see also, Matter of Sands v Sands, 105 A.D.2d 788, appeal dismissed 64 N.Y.2d 767).

Respondent made partial support payments and, at the same time, made several attempts to have the support order modified. To deprive a person of liberty by commitment to prison, the willful violation of a prior court order must be established by clear

> and convincing evidence (Matter of Cox v Cox, 133 A.D.2d 828; Bulow v Bulow, 121 A.D.2d 423). **Such evidence is not presented here. The commitment of respondent is not warranted on this record.**

On September 8, 1989 Judge James issued his new support order placing Mr Collins in arrears by over $4,000.00 without giving him full credit for all monies paid towards support as required by Family Court Act § 449. Mr Collins should have had a credit of over $15,000.00.

Judge Plumadore in his decision dated December 11, 1989 which was the basis of his January 8, 1990 Order and his February 28, 1990 Decision and Order specifically ruled:

> — this form of support (Defendant Carella and the children being housed in a **non-marital** residence titled originally to Defendant Collins, the father, and Plaintiff's, his mother and step-father, and now titled only to Plaintiff's) is no longer squarely mandated by virtue of the Appellate Division's October 19, 1988 decision reversing the April 15, 1987 and April 22, 1986 Saratoga County Family Court Orders and the subsequent (September 8, 1989) decision of the Family Court on remand;
>
> (The October 19, 1988 and January 26, 1989 Appellate Court rulings are the same. Oral argument was heard on October 19,1988 and the opinion rendered January 26,1989.)
>
> — Family Court has no jurisdiction over title, mari-

tal or otherwise;

— this Article 15 proceeding is almost unnecessary from Plaintiff's (King) viewpoint inasmuch as Carella and the children have no interest equivalent to or impinging upon title and Plaintiff's need only to seek to evict them;

— given the apparent amount of arrearages, however, and Defendant Collins' initial 1/3 interest in the home, Defendant Carella is entitled to assert fraudulent conveyance as either a defense to Plaintiff's (King's) claim of fee simple absolute or in a separate action to protect her and the children's interest in the arrearages, which action would be consolidated with this one in any event;

The arrearages, that Judge Plumadore is referring to, are based upon a secret contempt of court proceedings against Mr Collins where he has been denied his constitutional rights to a public trial, etc. These arrears were determined by Judge James' Decision and Order of September 8, 1989 and the Saratoga County Support Collection's determination letter of September 15, 1989.

On May 9, 1990 Judge John Austin issued an Order to Show Cause which states:

> . . . why an Order should not be made finding that the respondent, Charles E. Collins, III has willfully vailed to comply with the provisions of the Support Order made by the Hon. L. Foster James on April 15, 1987, and later modified by the Order of the Hon. L. Foster James dated September 8, 1989; that the arrears of support have accumulated, the exact amount of which is not ascertainable at this time,

> but which petitioner believes to be in excess of $7,000.00. . . .

On January 22, 1991 the Saratoga County Family Court issued a summons based upon a petition filed by the Saratoga County Support Collection Unit o/b/o Arlene Carella, which stated:

> ". . . to answer the Petition and to show cause why you should not be dealt with in accordance with Section 454 of the Family Court Act and Section 5242 of the Civil Practice Law and Rules.

Judge Austin in his Decision and Order of September 17, 1992 issued a warrant for Mr Collins' arrest and suspended his visitation rights with his children for his refusal to appear for trial on the charge of contempt. At this point in time Mr Collins had not seen his children for almost five years because of the court's refusal to protect his visitation rights with his children as a form of punishment for contempt.

As documented Mr Collins refused to appear for trial as the trial was to be held in secret, without a jury, was being denied his right to call witnesses and based upon the fact that he has been denied his right in previous secret contempt proceedings to cross-examine witnesses he believed he could not get a fair trial and that his con-

stitutional rights were being deliberately violated.

Mr Collins is currently facing a contempt charge before Judge John Austin where his potential sentence exceeds six months in jail **and** more than a $5,000.00 fine. The trial is to be held in secret as Petitioner is being denied access to the court as is the public and news media over Mr Collins' objections and Mr Collins is being denied his constitutional rights as stated above.

In September 1991 Ms Carella filed suit against Petitioner, her husband and Mr Collins claiming that they conspired to violate her rights pursuant to Judge James' Decision and Order of April 22, 1986 giving her exclusive possession of Petitioner's property located at 189 Wooddale Drive by having her evicted and is suing for damages in the amount of $600,000.00.

Judge Keniry as documented by his Decision and Order of June 23, 1992 is allowing Ms Carella to sue Petitioner, her husband and Mr Collins for attempting to evict her from 189 Wooddale Drive and is refusing to address the issue that Judge Plumadore in his December 11, 1989 Decision and January 8, 1990 Order has already

ordered that Ms Carella can be evicted and that Judge James' Decision and Order of April 22, 1986, which is the basis of the complaint or suit, has been overturned by the Appellate Court is no longer mandated by virtue of Judge James September 8, 1989 Decision and Order.

ARGUMENTS

In Re Rosahn, 671 F.2d at 695, 696, 697 (2nd Cir. 1982):

[9] Another argument not raised below is that the contempt proceeding was conducted in a manner **that violated her right to due process because a full adversary hearing was not held, no witnesses were called, she was not informed of her right to call witnesses, and she was not offered an opportunity to address the court before issuance of a civil contempt order**. . .

[10] . . . In In Re Oliver, 333 U.S. 257, 68 S.Ct. 499, (1948) which struck down a secret criminal contempt trial as violative of due process, **the Supreme Court stressed that at the heart of due process clause is "[t]he traditional Anglo-American distrust for secret trials," which throughout history have been associated with "institutions [that] obviously symbolized a menace to liberty."** Id. at 268-69, 68 S.Ct. at 505.

> "In view of this nation's historic distrust of secret proceedings [and] their inherent danger to freedom, . . . **the guarantee [of public proceedings] has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution.**" Id. at 270, 273, 69 S.Ct. at 507.

The safeguard of open proceedings not only represents "an effective restraint on possible abuse of power," Id. . . ., but also reflects "the notion, deeply rooted in common law,

'that justice must satisfy the appearance of justice.'" (Citations omitted)

While the passages quoted from In re Oliver were written primarily with criminal trials in mind, it is significant that the contempt sentence overturned by the Oliver Court on the ground that the contempt proceeding below had been improperly closed to the public was a conditional jail sentence that would have terminated upon compliance with the trial court's order. Accordingly, the Oliver analysis was applied to invalidate a contempt sanction whose central characteristic—its conditional nature—is typical of a *civil* contempt. . . . .

[11, 12] The government argues that whatever may be the rule in a criminal contempt trial, there is no Fifth Amendment requirement that a *civil* contempt trial pursuant to 28 U.S.C. § 1826 be held in public. We are unpersuaded by this distinction. As we noted in In re Bella, 518 F.2d 955, 958-59 (2nd Cir. 1975):

> "Admittedly . . . a proceeding [under § 1826] is basically civil in nature. The purpose of holding a witness in contempt is to coerce him to answer the grand jury's questions, not to punish him for reprehensible conduct. . . . **Yet, the burden of imprisonment is just as great, regardless of what we call the order that imposed it. It is this fact that fosters the need for procedural protection.**"

Given the burden that imprisonment imposes on an individual, **a civil contempt trial that could result in an order of confinement carries with it the same concerns and purposes that lead to the requirement of a public trial in the criminal context**, such as the need to assure accountability in the exercise of judicial and governmental power, the preservation of the appearance of fairness, and the enhancement of the public's confidence in the judicial system. . . .

[13] **Our conclusion that alleged civil contemnor's, like criminal contemnor's, have some right to a public proceeding** is supported by and consistent with

the trend in this and other Circuits to **afford the same or similar procedural safeguards to persons charged with civil contempt as to those charged with criminal contempt. * * * We are satisfied that the protection against unnecessary secret proceedings extends beyond the criminal context.** [One court has held that to comport with due process requirements certain quasi-judicial administrative proceedings "that involve important constitutional rights" must "be open to the press and the public." Fitzgerald v. Hampton, 467 F.2d 755, 763, 766 [D.C.Cir. 1972])

We hold, therefore, that Rosahn's **due process rights were violated when the trial court ordered the entire contempt proceeding closed over her objection**. We need not and do not decide whether the due process clause extends the same degree of protection to civil contemnor's who do not face imprisonment.

In re Di Bella, 518 F.2d 955 (2nd Cir. 1975):

In Argersinger v. Hamlin, 407 U.S. 25, 37, 92 S.Ct. 2006, the Court held that, absent a knowing and intelligent waiver, **no person may be imprisoned for 'any' offense**, whether classified as petty, misdemeanor, or felony, unless he is represented by counsel at his trial. The Circuits with the opportunity to do so have concluded that this right must be extended to contempt proceeding, **be it civil or criminal, where the defendant is faced with the prospect of imprisonment.** See, United States v. Sun Kung Kang, 468 F.2d 1368 (9th Cir. 1972); In re Kilgo, 484 F.2d 1215 (4th Cir. 1973); Henkel v. Bradshaw, 483 F.2d 1386 (9th Cir. 1973). We agree.

United States v. Sun Kung Kang, 468 F.2d 1368 (1972):

Appellant, an indigent, had requested appointment of counsel to represent him in the civil contempt proceeding.
. . .

. . . . **Threat of imprisonment is the coercion that makes a civil contempt proceeding effective. The civil label does not obscure its penal nature.** (*Cf.*

Harris v. United States, (1965) 382 U.S. 162, 86 S.Ct. 352.

Larisa F. v. Michael S., 470 N.Y.S.2d 999 (Fam. Ct. 1984):

[1,2] . . . **A civil contempt is a quasi-criminal proceeding**.

Hynes v. Hartman, 63 A.D.2d 1, 406 N.Y.S.2d 818 at 819 (1st Dept. 1978):

[1-3] Although **a proceeding to punish for civil contempt is a civil proceeding, it is quasi criminal in nature**.

In Re Oliver, (1948) 68 S.Ct. 499 at 507, 508, 510 held:

[8] . . . , **no court in this country has ever before held**, so far as we can find, **that an accused can be tried, convicted and sent to jail, when everybody else is denied entrance to the court**, except the judge and his attaches. **And without exception all courts have held that an accused is at the very least entitled to have his friends, relatives and counsel present, no matter what offense he has been charged.**

[10, 11] . . . A person's right to reasonable notice of the charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, **as a minimum**, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel. . . .

[15] Nor is there any reason suggested why "demoralization of the court's authority" would have resulted from giving the petitioner a reasonable opportunity to appear and **offer a defense in open court** to a charge of perjury or **to the charge of contempt**. . . . **The right to be heard in open court** before one is condemned to too valuable to be whittled away under the guise of "demoralization of the court's authority".

[16] It is **"the law of the land" that no man's life,**

liberty or property be forfeited as a punishment until there has been a charge fairly made and fairly tried in a public tribunal. See Chambers v. Florida, 309 U.S. 227, 236, 237, 60 S.Ct. 472, 477, 84 L.Ed. 716. The petitioner was convicted without that kind of trial.

Matter of Chase, 446 N.Y.S.2d 1000 (Fam. Ct. 1982) clearly holds that Family Court proceedings, both civil and criminal, are to be open to the public pursuant to the United States Supreme Court in its rulings. Chase relied upon Richmond Newspapers, Inc. v. Virginia, 100 S.Ct. 2814 and Matter of Westchester Rockland Newspapers, Inc. v. Leggett, 48 N.Y.2d at 438.

Chase, supra, People v. Cuevas, 50 N.Y.2d 1022, People v. Boyd 59 A.D.2d 558, 397 N.Y.S.2d 150, People v. Gonalez, 426 N.Y.S.2d 318, Herald Co., Inc. v. Weisenberg, 89 A.D.2d 224, 455 N.Y.S.2d 413 and The People, etc. v. Warren O, 86 A.D.2d 895, 447 N.Y.S.2d 517 have **all held that the closing of a court which is not preceded by an inquiry and the reasons for the closure being given in open court is a violation of constitutional rights.** There has never been a reason given for closing of the court in Mr Collins case.

New York Penal Law Article 10 - Definitions:

1. "Offense" **means conduct for which a sen-**

tence to a term of imprisonment or a fine is provided by any law of this state or by any law, local law or ordinance of a political subdivision of this state, **or by any order**, rule or regulation of any governmental instrumentality authorized by law to adopt the same.

4. "**Misdemeanor**" means an offense, other than a "traffic infraction," for which a sentence to a term of imprisonment in excess of fifteen days may be imposed, but for which a sentence to a term of imprisonment in excess of one year cannot be imposed.

5. "Felony" means any offense for which a sentence to a term of imprisonment in excess of one year may be imposed.

6. "Crime" means any misdemeanor or a felony.

As contempt of a court order for failure to pay support is punishable by six months imprisonment under Family Court Act 454, it is therefore an "offense" which would be classified as a misdemeanor and is therefore, considered a "crime". As contempt for failure to pay support pursuant to court order is considered a "crime" under state statute and case law it must be considered a "criminal act". See, Linda G. v. Theodore G., 345 N.Y.S.2d 361 at 366 (Fam. Ct. 1973).

As Argersinger held "no person may be imprisoned for any offense", and as contempt for failure to pay support is an "offense" under state statute as imprisonment is a possibility, Argersinger is applicable.

Family Court Act, Article 4, § 433 - Hearing:

> Upon the return of the summons or when a respondent is brought before the court pursuant to a warrant, the court shall proceed to hear and determine the case. The respondent shall be informed of the contents of the petition, advised of his right to counsel, and shall be given opportunity to be heard and to present witnesses. **The court may exclude the public from the court in a proper case.**

Family Court Act, Article 4, § 433 is unconstitutional as it allows the court to be summarily closed to the public in a "contempt proceeding" in violation of the U.S. Constitution and applicable U. S. Supreme Court and U.S. Court of Appeals rulings as well as N.Y. Judiciary Law Art. 2, § 4. In a proper case the court should be **open** to the public in a contempt proceeding whether civil or criminal in nature.

Petitioner has clearly documented that her property has been taken from her in a secret contempt proceeding as a punishment for Mr Collins' alleged actions and that she was not a party to the proceeding. Petitioner is being tried and convicted as a contemnor without being accused of any contempt. The court is not allowing her to defend herself against the charge of contempt.

This Court should determine whether Plaintiff and

her son are entitled to their constitutional rights as defined In Re Oliver, supra, as possession of her property valued over $50,000.00 has been taken away as part of the punishment of her son's contempt proceeding and the fact that Mr Collins has been tried, convicted and sentenced to jail for contempt and again faces imprisonment in a secret contempt proceeding. He was also been deprived of his children for over five years because of these secret contempt proceedings and when he refused to forfeit his constitutional rights to a public trial, etc. the court ordered that he could not see his children. This was done in secret and is a denial of due process.

Petitioner has a constitutional right to be present during her son's contempt proceedings which she has been consistently denied. She also has the right to be present as they are punishing her for Mr Collins' alleged actions while lacking personal jurisdiction over her.

18 U.S.C.A. § 1 (3) defines the difference between a petty offense which does not require a jury trial and a serious offence which would entitle a contemnor to a jury trial. If the punishment exceeds six months in jail or a

f$5,000.00 or both a contemnor is entitled to a jury trial.

United States v. Rylander, 714 F.2d 966, 1005 (1983):

> [19-22] There is a sixth amendment right to a trial by jury in serious, but not petty, criminal contempt cases. Bloom v. Illinois, . . ., 88 S.Ct. 1477, 1480, . . ., (1968). Whether a criminal contempt is serious or petty is determined by the severity of the penalty authorized. Frank v. United States, . . ., 89 S.Ct. 1503, 1505, . . ., (1969). **If the contempt is charged under a statute that authorizes a maximum penalty greater than $500.00 or six month's imprisonment, there is a right to a jury trial regardless of the penalty actually imposed.** Muniz v. Hoffman, . . ., 95 S.Ct. 2178, 2190-91, . . . (1975).. . .

Blanton v. City of North Las Vegas, Nev., 109 S.Ct. 1289 (1989) held:

> [1] **In using the word "penalty" we do not refer solely to the maximum prison term authorized for a particular offense. A legislature's view of the seriousness of an offense also is reflected in the other penalties that it attaches to the offense.** See United States v. Jenkins, 780 F.2d 472, 474, and n. 3 (CA4), cert. denied 476 U.S. 1161, 106 S.Ct. 2283. We thus examine "whether the length of the authorized prison term for the seriousness of other punishment is enough in itself to require a jury trial." Duncan, supra, 88 S.Ct. at 1453; see also Frank, 395 U.S. at 152, 89 S.Ct. at 1507 (three years' probation is not "onerous enough to make an otherwise petty offense 'serious'"). Primary emphasis, however must be placed on the maximum authorized period of incarceration. Penalties such as probation, or a fine may engender "a significant

> infringement of personal freedom," id, at 151, 89 S.Ct. 1506, but they cannot approximate in severity the loss of liberty that a prison term entails. Indeed, because incarceration is an "intrinsically different" form of punishment, Muniz v. Hoffman, 422 U.S. 454, 477, 95 S.Ct. 2178, 2190 (1975), it is the most powerful indication whether an offense is "serious".
>
> [2,3] Although we did not hold in Baldwin, that an offense carrying a maximum prison term of six months or less automatically qualifies as a "petty" offense, and decline to do so today, we do find it appropriate to presume for purposes of the Sixth Amendment that society views such an offense as "petty". **A defendant is entitled to a jury trial in such circumstances only if he can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a "serious" one. This standard, albeit somewhat imprecise, should ensure the availability of a jury trial in the rare situation where the legislature packs an offense it deems "serious" with onerous penalties that nontheless "do not puncture the 6-month incarceration line."** (See also, U.S. v. Bencheck, 926 F.2d 1512 at 1518 (1991)

Before the Family Court can deny a contemnor a jury trial the court must first determine what the **potential** maximum penalty is for contempt of court for of failure to pay support pursuant to court order. Therefore, this Court must look to Family Court Act, Article 4, 454. Under FCA § 454 Mr Collins' current potential maximum penalty for contempt of court for failure to pay support is:

1. under § 454(2-a) the court is required to issue a money judgment against Mr Collins which would exceed $7,000.00

2. under § 454(2-b) having his income attached by the court.

3. under § 454(2-c) based upon FCA § 471, Mr Collins would have to post a cash deposit in the amount of ($120.00/wk x 156 wks (3 years x 52 wk) = $18,720.00. Failure to post a cash deposit or collateral in this amount could result in another six months in jail for failure to comply with the court order.

4. under § 454(3) Appellant would have to pay his ex-wife's attorney fees for this proceeding. Petitioner has clearly documented that this would exceed $5,000.00.

5. under § 454(3-a) incarceration for six months plus more jail time if he is unable to pay his ex-wife's attorney fees and/or post an undertaking or post cash to guarantee compliance. Also, if he violated probation after serving six months he would be facing more jail time.

Therefore, the **potential** jail sentence is for more than six months as the punishment and the punishments

that can be imposed in the future are factually linked and are based upon this contempt proceeding. This is especially true since Mr Collins has been declared an indigent defendant and would not be able to pay his ex-wife's attorney fees or post the cash or other collateral that could be imposed upon him.

6. under § 454(3-b) probation after he gets out of jail after serving his six months. Under FCA § 456 - Probation, Mr Collins can be put on probation until his youngest child reaches 21 years of age, the age that he is required to support him to under court order. His son is now 12, which means Mr Collins can spend the next 9 years on probation.

It should be noted that if this were a "criminal" contempt proceeding, under Judiciary Law § 751 Mr Collins' jail sentence **can not** exceed thirty (30) days. As documented Mr Collins faces a sentence of up to six months in jail and possibly more jail time plus the loss of property that exceeds $5,000.00 plus costs, etc. The punishment for "civil" contempt is more severe than the punishment for "criminal" contempt.

Petitioner has had possession of her property valued over $50,000.00 taken from her as well as being forced to pay over $1,000.00 a month since July 1987 to pay for the mortgage, taxes and insurance on the house or lose the house in a foreclosure action because of these secret contempt proceedings and the state courts refusal to protect her constitutional and civil rights.

The severity of the entire potential penalty for failure to pay support clearly reflects the legislatures determination that failure to pay support is a "serious" offense and therefore, would warrant a jury trial under federal standards. Richter v. Fairbanks, 903 F.2d 1202.

United States Ex Rel. Griffen v. Martin, 409 F.2d 1300 at 1302 (2nd Cir. 1969) the Court of Appeals held that a jury trial was not required at that time as the only penalty at that time was incarceration that was not to exceed six months. Since that decision, the Family Court Act § 454 has been modified several times to increase the "severity" or "seriousness" of the penalty for contempt of court to where it now exceeds six months in jail or a $5,000.00 fine or both. Therefore, due to the changes in

this section of the Family Court Act since that federal court ruling, that decision is no longer applicable.

Therefore Family Court Act § 435 is unconstitutional as it holds that contempt proceedings are held without a jury trial.

Article 4, Section 439 of the Family Court Act is unconstitutional as it deprives a litigant facing a contempt charge of due process.

§ 439 Hearing Examiners

> (a) . . . Except as hereinafter provided, hearing examiners shall be empowered to hear, determine and grant any relief within the powers of the court in any proceeding under this article, article 5 and five-a of this act, . . .

Thus, the Hearing Examiner, a non-judicial employee of the Unified Court System, is for all purposes a judge possessing all the powers of a Family Court Judge duly elected pursuant to Article 6, § 13(a) of the Constitution in support proceedings, USDL proceedings, proceedings involving enforcement or support orders by income executions, and the **fact-finding part of contempt proceedings.**

Family Court Act, Article 4, Section 439 of the

Family Court Act is unconstitutional as it transfers the powers vested in duly elected Supreme Court judges and Family Court judges to non-judicial, non-elected employees of the Unified Court System by changing the composition of the Family Court as defined by the New York State Constitution Article 6, Section 13(a) without amending the State Constitution. The State Constitution does not authorize the creation of the hearing examiner's office to determine support or violations of support known as contempt proceedings. The State Constitution has specifically given that authority to the Supreme Court judges and to the Family Court when referred to it by the Supreme Court.

This is also a denial of due process under the Fourteenth Amendment as a litigant is being tried for contempt and faces a potential jail sentence and the loss of property as a punishment based upon determinations of a person who is not even a judge. Petitioner is being deprived of her property and Mr Collins has been sentenced to jail based upon determinations of a person who is not a judge and who has held several secret contempt proceed-

ings which have directly affected her property interests and Mr Collins right to his liberty.

Hofferber v. The First National Bank of Guyman, Oklahoma, 437 F. Supp. 788:

> It is beyond doubt that property rights are protected by the Fourteenth Amendment and violations thereof can be redressed by suit under 42 U.S.C. § 1983. Lynch v. Household Finance Corp., 405 U.S. 538, 92 S.Ct. "1113 (1972).

Acquisition, enjoyment and alienation of property are among those basic constitutional rights protected by Civil Rights Act of 1871. 42 U.S.C.A. § 1983. Privitera v. Town of Phelps, 79 A.D.2d 1, 435 N.Y.S.2d 402; Jones v. Alfred H. Mayer Co., 392 U.S. 409, 432, 88 S.Ct. 2186, 2199.

Requirements of subject matter jurisdiction and personal jurisdiction are conjunctional as both must be met before a court has authority to adjudicate rights of parties to a dispute Rankin v. Howard, 633 F.2d 848; Dykes v. Hoseman, 743 F.2d 1488; McDonald v. McBee, 37 S.Ct. 343; and Pennoyer v. Neff, 95 U.S. 714. These courts have all held that a judge looses his judicial immunity when a court **lacks** personal jurisdiction over a party

in order to adjudicate that party's rights.

Dykes v. Hoseman, 743 F.2d 1488 at 1495 (11th Cir. 1984):

> [11] It is clear that a judge who acts in the absence of jurisdiction may be held liable for his judicial acts. Stump v. Sparkman, 435 U.S. 349, 98 S.Ct. 1099 (1978).

Arment v. Commonwealth Nat. Bank, D.C. Pa. 1981, 505 F.Supp. 911 holds that where it is alleged that the attorney "joined" or "cooperated with" or "conspired with" state officers who acted under color of state law, state action will exist.

Dinwiddie v. Brown, C.A. Tex. 956, 230 F.2d 465, cert. denied 76 S.Ct. 1041 holds that where state officers conspire with private individuals to defeat or prejudice litigant's rights in state court, litigant is thereby denied equal protection of laws by persons acting under color of state law, and cause of action is created cognizable by federal courts under this section.

Judge James knew he did not have personal jurisdiction over Petitioner when he gave possession of her property to Ms Carella as a punishment in a contempt proceeding against Mr Collins nor did Judge James have

subject matter jurisdiction to award Ms Carella exclusive possession of Petitioner's property pursuant to Judge Plumadore's Decision of December 11, 1989. This is supported by the New York State Constitution, Article 6, § 13 which specifically states the jurisdiction of the Family Court. The Family Court is not authorized to determine either title or possession of real property whether it be marital or otherwise.

Rankin, supra, also held:

> But when a judge knows he lacks jurisdiction, or acts on the face of clearly valid state statutes or case law expressly depriving him of jurisdiction, judicial immunity is lost. See, Bradley v. Fisher, 80 U.S. (13 (Wall) at 351 ("when want of jurisdiction is known to the judge, no excuse is permissible); . . .

It is Petitioner's position that Judge James knew that he lacked subject matter jurisdiction pursuant to the State Constitution to award Ms Carella possession of Petitioner's property.

Petitioner has requested an injunction against the state court judges to prevent them from continuing the violation of her as well as of her son's constitutional rights as well as the Federal Court to assume jurisdiction over the state court proceedings. The violation of Mr Collins'

rights has had and continues to have an effect upon her rights including her right to her property and to be present during her son's contempt proceeding.

Where there is a deprivation of constitutionally guaranteed right, duty of federal court to use injunctive power to interfere with conduct of state officers **cannot** be avoided. Woods v. Wright, 344 F.2d 369 (1964).

Federal courts have a duty to entertain solid claim of unconstitutional restraint by state under color of its law, and jurisdiction of federal court is not defeated by anything which may occur in state proceedings. Smith v. State of Kansas, 356 F.2d 654 (1966), cert. denied 88 S.Ct. 154.

A federal district court has authority to issue injunctive relief against commission of acts in violation of a plaintiff's civil rights by state judges acting in their official capacity and by an officer appointed by a state court. Staud v. Stewart, 1973, 366 F.Supp. 1398, affd. 547 F.2d 1164.

Sostre v. Rockefeller, 312 F.Supp. 863, 884 (D.C.N.Y. 1970), affirmed in part, reversed in part on other grounds

442 F.2d 178, cert. denied 92 S.Ct. 719 held:

> [23] The cases in which injunctions have been issued against state officials for violating Fourteenth Amendment rights in the last two decades are legion. Such injunctions issue, **as a matter of right**, where a violation of constitutional rights has been proved. **This court has no discretion to deny injunctive relief** to a person who clearly establishes, after trial on merits, that he is being denied his constitutional rights. *Cf.* Henry v. Greenville Airport Commission, et al., 284 F.2d 631 (4th Cir. 1960). In addition, the court's decree, where warranted, **may provide for the retention of jurisdiction to insure that the injunctive order is carried out** in an orderly fashion. Brown v. Board of Education of Topeka, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955); . . . .; or to allow the amendment of state rules to conform with the decree, Sostre v. McGinnis, supra, 334 F.2d at 912-913. However, **the injunction must issue.**

Javits v. Stevens, 382 F.Supp. 131 (D.C.N.Y. 1974):

> [5] . . . Our Court of Appeals has held that:
>
> "[N]o sound reason exists for holding that federal courts should not **have the power to issue injunctive relief against commission of acts in violation of plaintiff's civil rights by state judges acting in their official capacity."**

Injunctive relief against higher public officials is available in situations where they have found to supervise and authorize unconstitutional activities. Farber v. Rochford, 407 F.Supp. 529 (1975).

Petitioner has documented that Attorney General

Abrams has supervised and authorized his assistants to participate in violation of Mr Collins' constitutional rights to a public trial, etc. in the Family Court contempt proceeding in which Mr Collins' faces imprisonment.

Family Court Act §§ 449 and 451 deprives the person paying support of equal protection of the law. Under these sections if a person has under paid during the period of time between the filing of the petition to the time of the court decision, they are required to make up the difference between what has been paid and what should have been paid. On the other hand, if they have over paid during this period of time they **are not** entitled to a credit or recoupment of what they have over paid.

Whether or not a judge has ample discretion to modify retroactive awards for under payments as well as over payments of support in the interest of justice, despite the provisions of § 449, is not the question. The Question is - do §§ 449 and 451, as they are written, treat each party equally as they relate to over payments and under payments. The answer is no. Therefore, they are unconstitutional as they deny the person paying support of equal

protection of the law.

As documented the Statute of Limitations does not bar this action. When a litigant has been injured by fraud or concealment the statutory limitations period does not begin to run until the discovery of the injury. (Briley v. State of Cal., 564 F.2d at 848, 850, 855 (1977); See also, Holmberg, 327 U.S. at 397, 66 S.Ct. 582; Hilton, 522 F.2d at 602). This Complaint was filed on August 3, 1992. Appellant did not learn that Judge James lacked subject matter jurisdiction until September 13, 1989 which was substantiated by Judge Plumadore's December 11, 1989 Decision. She did not learn until 1991 that the court needed personal jurisdiction over her. Both are within the three year Statute of Limitations. All actions by Judge Austin, Judge Keniry and Robert Abrams have been within the past three years.

Martin v. Merola, 532 F.2d 191 (1976) at 192:

> In the absence of any federal statute of limitations, § 1983 actions brought in New York are governed by New York's three year period for suits based on a statute. 42 U.S.C.A. § 1983; CPLR N.Y. 214.

Federal Procedures Lawyers Edition, 1989, Civil Rights

§ 11:241. Accrual; tolling

Although federal courts borrow state statutes of limitations in actions brought under 42 U.S.C.A. § 1983, the determination of the date when the federal cause of action accrues is customarily governed by federal standards. The time of accrual under federal law is when the plaintiff knows or has reason to know of the injury which is the basis of the § 1983 action.

Briley v. State of Cal., 564 F.2d 849 (1977) at 850, 855.

7. Where civil rights plaintiff has been injured by fraud or concealment and remains ignorant of it without any fault or want of diligence on his part the statutory limitations period **does not begin to run until the discovery of the injury**. 42 U.S.C.A. § 1983

. . . . . .

The established rule, which we apply in this case it that, where a plaintiff has been injured by fraud or concealment and remains in ignorance of it without any fault or want of diligence on his part, the statutory period does not begin to rum until the discovery of the injury. Holmberg, supra, 327 U.S. at 397, 66 S.Ct. 582, Hilton, supra, 522 F.2d at 602;

Petitioner has clearly argued and documented that it was not until September, 1989 that she discovered that Judge James had no authority to give Ms Carella exclusive possession of the non-marital real property; it wasn't until 1991 that she discovered that the family court judges and hearing examiner lacked subject matter juris-

diction over the issues of custody, visitation and support based upon the State Constitution, state statute, case law. It wasn't until 1991 that Petitioner discovered that the judges needed personal jurisdiction over her in order to deprive her of her property and to use her assets in determining Mr Collins support obligation during the contempt proceedings. All actions in the complaint have taken place within the three year statute of limitations.

Petitioner has clearly demonstrated that she is being personally punished for contempt of court because of Mr Collins' alleged actions by the Family Court decisions and orders as her real property has been taken away from her as a punishment and she continues to be deprived of her property because of the secret Family Court contempt proceedings and the fact that Petitioner is being forced to support Mr Collins' ex-wife by having to pay the mortgage, taxes and insurance on the house or lose the house in a foreclosure or tax sale. The State courts are attempting to hold and are holding Petitioner liable for Mr Collins' "so called" arrearages and alleged contempt of court, yet they are refusing to allow her to use the money

paid for the mortgage, taxes and insurance, which benefit only Ms Carella, to offset Mr Collins' "so called" arrearages. Appellant also has a corrolary right to be in court with her son during his contempt proceeding pursuant to In Re Oliver.

Appellant in her Affidavit in Support of Cross-Petition and in Opposition to Motion to Dismiss dated September 17, 1992 (A-65 to A-79) documents that Mr Collins refused to appear for trial on the charge of contempt on August 13, 1991 (A-72, item 41) and on September 13, 1991 (A-72, item 43) as the trial was held in secret and without a jury. That Judge Austin issued a Decision and Order dated September 17, 1991 which issued a warrant for Mr Collins' arrest for failure to appear for trial and suspending his visitation rights in order to force him to forfeit his constitutional rights. Both hearings for which Mr Collins did not show were held in secret and Judge Austin's Decision and Order to have Mr Collins arrested and deprived of his children is based upon these secret contempt proceedings.

Petitioner would ask this Court to issue an injunc-

tion to prevent Judge Austin, who is a party to this proceeding, from holding trial or any hearing to determine if Mr Collins is in contempt of court until this Court rules on this petition. The trial is to be held in secret, without a jury and Mr Collins is not being allowed to call witnesses on his behalf even though he has both a constitutional right as well as a statutory right under Family Court Act § 433. See, Silvestris v. Silvestris, 24 A.D.2d 247, 265 N.Y.S.2d. 173: Abbondola v. Abbondola, 40 A.D.2d 976, 338 N.Y.S.2d 1975 (1972)

CONCLUSIONS

1. Petitioner is being treated as a contemnor and her property has been taken from her as a punishment based upon secret contempt proceedings against her son.

2. Family Court Act § 433 is unconstitutional as it allows the court to be summarily closed in a contempt proceeding where imprisonment is a possibility.

3. Family Court Act § 435 is unconstitutional as it denies a litigant of a jury trial when the potential maximum sentence that can be imposed for contempt exceeds six months in jail, or a $5000.00 fine or both.

4. Family Court Act § 439 is unconstitutional as it allows a non-judicial employee make judicial decisions and orders concerning the incarceration of a litigant for contempt

5. Family Court Act §§ 449 and 451 are unconstitutional as they deprive a litigant of equal protection of the law.

6. Petitioner has amply demonstrated that the New York State Court proceedings should be transferred to federal court.

7. That Judge L. Foster James has acted in complete absence of all jurisdiction.

8. That Petitioner has a constitutional right to attend her son's contempt proceeding.

9. That Petitioner is being denied both due process and equal protection of the laws under the Fourteenth Amendment.

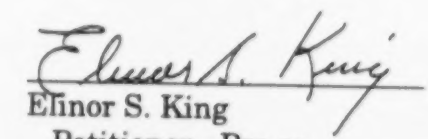
10. That the Family Court judges lacked personal jurisdiction over her to place a personal obligation upon her and to deprive her of her property.

The constitutional rights of an accused in a civil

contempt proceeding must be addressed by this Court as this is an important question of Federal Law. Is an accused in a civil contempt proceeding entitled to their constitutional rights whether or not they face imprisonment and or the loss of their property as would be a criminal contemnor? For a person to be sentenced to jail in a secret contempt proceeding whether civil or criminal in nature is not only horrifying but a contradiction upon which this great country was founded. How many litigants are currently in jail based upon a secret "civil" contempt proceeding? Constitutional rights must be protected by this Court and secret contempt trials must end, whether civil or criminal.

Petitioner prays that this court to grant certiorari to address the issues raised in this Petition.

Dated January 17, 1993 Respectfully submitted



Elinor S. King
Petitioner - Pro se
108 Brunswick Road
Troy, New York 12180

APPENDIX

Exhibit 1 (93-6065)	U.S. Court of Appeals Second Circuit, Order Entered October 22, 1993
Exhibit 2 (92-CV-1004)	U.S. District Court Ruling from Bench November 9, 1992
Exhibit 3 (92-CV-1004)	District Court Order Entered February 20, 1993

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City and County of New York, on the 22nd day of October, one thousand nine hundred and ninety-three

PRESENT: HONORABLE THOMAS J. MESKILL,
HONORABLE J. DANIEL MAHONEY,
HONORABLE JOHN M. WALKER, JR.,
Circuit Judges.

ELINOR S. KING
Plaintiff-Appellant,

- against -

O R D E R
No. 93-6065

ROBERT ABRAMS; L. FOSTER JAMES; JOHN AUSTIN; WILLIAM H. KENIRY and THE UNITED STATES DEPARTMENT OF JUSTICE,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was submitted.

ON CONSIDERATION WHEREOF, it is now ordered, adjudged, and decreed that the judgment of said district court be and it hereby is AFFIRMED.

1. Plaintiff-Appellant Elinor S. King appeals pro se from a judgment entered March 3, 1993 in the United States District Court for the Northern District of New York, Thomas J. McAvoy, Judge, that granted defendants-appellees' motion to dismiss King's complaint and awarded Rule 11 sanctions against King in the amount of $1,579.34. In her complaint, filed in August 1992, King asserted several claims arising from her son's 1981 divorce and related child custody and support matters subsequently litigated in New York state courts. King essentially alleged that: (1) several New York State court judges had conspired to deprive her and her son their constitutional rights during the course of the child custody and support proceedings in violation of 42 U.S.C. §§ 1983 and 1985 (1988), and that New York Attorney General Robert Abrams had aided and abetted these offenses; (2) several New York State court judges acted outside of their jurisdiction under New York law; and (3) New York Family Court Act § 433 (McKinney Supp/ 1993) is unconstitutional. King had made similar allegations in an earlier complaint filed in August 1991, which the district

court, Neal P. McCurn, Judge, dismissed as time barred, and on grounds of lack of subject matter jurisdiction, abstention, failure to state a claim, Eleventh Amendment immunity, and judicial immunity. See King v. James ("King 1"), No. 91-CV-952, 1991 WL 255110 (N.D.N.Y. Nov. 29, 1991), aff'd mem. 969 F.2d 1041 (2nd Cir.), cert. denied, 113 S. Ct. 70 (1992).

2. We affirm substantially for the reasons stated by the district court in its November 9, 1992 ruling from the bench and in its order dated February 20, 1993. We note further that the district court was within its discretion to sanction King in the amount of reasonable attorney fees. Although pro se litigants are held to less stringent standards than are attorneys, see Maduakolam v. Columbia Univ., 866 F.2d 53, 56 (2nd Cir. 1989), the record indicates that King knew or should have known that her action was without merit. As noted by the court below, Judge McCurn, in his thorough opinion in King I, took pains to explain the legal grounds for dismissing the prior action, and as Judge McAvoy stated in his bench ruling, "{e}ven if Mrs. King doubted Judge McCurn's wisdom , all

doubt should have been laid to rest when the [Second] Circuit affirmed his decision." A pro se litigant may properly be sanctioned when she persists in bringing an action "long after it should have been clear to [her] as a reasonable (though not law-trained) person, that [her] cause was indeed hopeless." Bacon v. American Fed'n of State, County, & Mun. Employees Council, 795 F.2d 33, 35 (7th Cir. 1986).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ELINOR S. KING,

Plaintiff,

v. 92-CV-1004

ROBERT ABRAMS, L. FOSTER JAMES, JOHN AUSTIN, WILLIAM H. KENIRY and THE UNITED STATES DEPARTMENT OF JUSTICE

Defendants.

Hon. Thomas J. McAvoy - Bench Decision

THE COURT: Okay. As noted here, this case is the most recent of a series filed by Mrs. King and her son, Charles Collins, commencing in May 1990. The actions all arise out of the divorce of Charles Collins and Arlene Carella in 1981 and the ensuing State court proceedings related to child custody, support and other matters. The first action Collins v. Austin, a case decided by me; Collins v. Unified Court System, a case also decided by me; then Mrs. King came along with King v. James, which was before Judge McCurn, and that suit was filed in August of 1991, and the action in part, before Judge McCurn, was based on facts alleged in Collins I and Collins II.

Now, Judge McCurn wrote a 29-page decision and dismissed the complaint with prejudice. The grounds for dismissal were as follows; the court lacked jurisdiction to hear the case under the Rooker-Feldman doctrine; the on going State court proceedings required the Court to abstain under the Younger doctrine; and the plaintiff failed to state a claim under 1983. By order dated May 8th 1992, the Second Circuit affirmed dismissal of that action. I have been informed today that a petition for a writ of certiorari has been denied by the U.S. Supreme Court.

Now, dealing with the present complaint filed August 31, 1992, the plaintiff seeks to recover damages under Title 42 U.S.C. 1983 and Section 1985. The factual allegations contained in that complaint relate to the matters presented in Collins I and Collins II and, in addition, the matters involved in the case before Judge McCurn, which I'll call King I. A large number of the allegations deal with matters before August of 1989/ Now, since the statute of limitations for 12983 and 1985 claims is three years - - Owens v. Okure, 488 U.S. 235,

109 Supreme Court 573; and Singleton v. City of New York, 632 F.2d 185 - - plaintiff is barred from raising any claim which arose prior to August 3, 1989\ The claims contained in the complaint which are not barred by the stature of limitations, as well as mot of those that are, relate to orders and actions of the Family Court and other State courts, with the exception of the allegations against the defendants Keniry and Abrams. These orders and actions were the subject of plaintiff's claims in King I. Judge McCurn dismissed that case with prejudice. It is well settled that such a dismissal constitutes a final judgment with the preconclusive effect of res judicata, not only as to all matters decided by it, but as to all relevant issues which could have been but were not raised and litigated in the suit," Nemaizer v. Baker, 793 F.2d 58, quoting Heiser v. Woodruff, 327 U.S. 726; Samuels v. Northern Telecom Inc., 942 F. 2d 834. An application of this principle to the present case dictates that, with the exception of the claims against the defendants Keniry and abrams, the complaint be dismissed.

Now, as to the claims against Keniry, the claim must

also be dismissed, but for other reasons. The claim arises out of an on going State proceeding arising out of the domestic litigation which is the focus of this series of lawsuits. The constitutional claim raised in the present complaint had been raised in at case as recently as September of this year. Therefore, this Court will abstain from considering this case based on the principles of comity and other principles which underlie the doctrine applied in Younger v Harris and subsequently applied to civil actions in Huffman v. Pursue Limited, 420 U.S. 592, rehearing denied 421 U.S. 971; Trainor V. Hernandez, 431 U.S. 434; and Moore v. Sims, 442 U.S. 415.

"To justify a refusal to assume jurisdiction on Younger grounds, a district court must answer three questions affirmatively: one, is there in on going state proceeding; two, is there an important state interest implicated; three, does the plaintiff have an avenue open for review of constitutional claims in the State Court?" Now, first of all, there is an on going State proceeding and, as Judge McCurn noted in his decision in King I, the area of domestic relations how is certainly an area of

significant State interest. See Fay v. South Colonie Schools, 802 F.2d 21. And, clearly, there is an avenue for the presentation of the constitutional claims in State court. Consequently, the Court will dismiss the claims against defendant Keniry.

Now, as to 1983 and 1985 claims submitted against State Attorney General Robert Abrams, the complaint is devoid of any factual allegations which would indicate a violation of plaintiff's constitutional or State rights actionable under 1983 or 1985. Therefore, this failure to plead with sufficient specificity warrants dismissal of the claim against defendant Abrams. See Polur V. Raffe, 912 F.2d. 52, cert. denied 111 Supreme Court 1389; Salahuddin v. Cuomo, 861 F.2d 40; Fonte v. Board of Managers 848 F.2d 24; Alfaro Motors v. Ward, 814 F.2d 883; Bar v. Abrams, 810 F.2d 358

Now, finally , addressing the question of Rule 11 sanctions: It is clear once the court finds a violation of Rule 11, imposition of sanctions is mandatory. Defendants argue that although Judge McCurn declined to impose sanctions in King I, plaintiff can no longer plead

ignorance of the applicable principles of law. Plaintiff has had the benefit of Judge McCurn's theory and detailed opinion in which he explained the doctrine of absentia, applicability of the statute of limitations, and pleading requirements for actions under 1983 and 1985. Even if Mrs. doubted Judge McCurn's wisdom, all doubt should have been laid to rest when the Circuit affirmed his decision. By filing the present action, the plaintiff has clearly disregarded the decision in her earlier action and demonstrated she has expended a lot of time and money in submitting materials to the Court and, given the fact she has ignored the applicable law, the Court finds sanctions shall be imposed. O'Malley v. New York City Transit Authority, 896 F.2d 704.

So the complaint is dismissed against the moving defendants. Monetary sanctions are warranted in the amount of attorneys' fees reasonably expended in making the present motion plus costs of the motion. Ms. Clerkin, submit an affidavit setting forth appropriate figures in 30 days and an order. Thank you, ladies.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ELINOR S. KING,

Plaintiff,

v. 92-CV-1004

ROBERT ABRAMS, L. FOSTER JAMES, JOHN AUSTIN, WILLIAM H. KENIRY and THE UNITED STATES DEPARTMENT OF JUSTICE

Defendants.

Hon. Thomas J. McAvoy - February 20, 1993

Order

In a decision rendered from the bench on November 9, 1992, the court granted the New York State Defendants' motion to dismiss the instant complaint, and granted the motion by those same defendants for sanctions pursuant to Fed.R.Civ.P. 11. Defendants were directed to submit an affidavit setting forth the amount of attorney's fees expended in the defense of this action. This affidavit was filed on December 8, 1992. As of the date of this order, Plaintiff has not filed any opposition thereto.

The affidavit of Assistant Attorney General Mary Ellen Clerkin provides the court with a detailed listing of

the time spent in defense of this action and the costs incurred. According to this affidavit, Assistant Attorney General Clerkin expended seventeen hours of time in reviewing the pleadings, preparing the motion to dismiss and reviewing plaintiff's opposition thereto, and preparing for and arguing the motion to dismiss before the court on November 9, 1992. This amount of time is reasonable considering the issues involved. Defendants seek to recover $90.00 per hour as a reasonable hourly rate for attorney's fees, and additional $49.34 for costs and disbursements. These are also reasonable figures.

Therefore, based upon the court's finding on November 9, 1992 that sanctions pursuant to Fed.R.Civ.P 11 are warranted in this matter, sanctions are hereby imposed on Plaintiff in the amount of $1579.34, payable to the New York State Department of Law. The clerk is hereby directed to enter judgment accordingly.

IT IS SO ORDERED.